132-216

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 99.

L. D. BROWN AND LEANDER HOLMES, APPELLANTS,

vs.

WILLIAM RANK.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF WASHINGTON.

FILED SEPTEMBER 29, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 18, 1889.

1 *Appeal from Supreme Court of Washington Territory to Supreme Court of the United States.*

L. D. BROWN and L. HOLMES, Appellants,
vs.
WILLIAM RANK, Appellee.

The above-named appellants, conceiving themselves ag-rieved by the final ruling and judgment rendered on the 18th day of July, 1885, in the above-entitled cause, do*th* hereby appeal therefrom to the Supreme Court of the United States and desire a transcript of the record proceedings, to wit, the complaint, answer, demurrer, ruling on demurrer by district court, motion to dismiss appeal in supreme court, ruling on motion to dismiss, judgment on dismissal, bond on appeal, and citation, duly authenticated, may be furnished, to send to the Supreme Court of the United States.

LEANDER HOLMES,
Attorney for Appellants.

I, Leander Holmes, being first duly sworn, depose and say that the value of the property in dispute in the above-entitled action far exceeds the sum of five thousand (5,000) dollars.

LEANDER HOLMES.

STATE OF OREGON, } ss:
County of Multnomah, }

Subscribed and sworn to before me this 20th day of July, A. D. 1886.

[Seal Granville G. Ames, Notary Public, State of Oregon.]

GRANVILLE G. AMES,
Notary Public for Oregon.

2 TERRITORY OF WASHINGTON, } ss:
County of Clarke, }

In the District Court of the Second Judicial District of Washington Territory, Holding Terms at Vancouver, for the November Term, 1884.

L. D. BROWN and LEANDER HOLMES, Plaintiffs,
vs.
WILLIAM RANK, Defendant.

And now come the plaintiffs herein and for cause of action allege that they are the owners in fee of the land described in this complaint, said land being a portion of land in Clarke county, Washington Territory, that was on the 13th day of October, 1877, patented to Amos M. Short and to his heirs. The parcel of land in the controversy in this action is described as follows, to wit: Beginning at a point 18 chains west of the northwest corner of Esther Short's donation claim patented to her and her heirs in Oct., 1877, running thence west nine chains; thence south to the north bank of the Columbia river; thence along the bank of said river upstream 10 chains and

90 links; thence north to the place of beginning, containing 64 acres, more or less, excepting a lot of about one acre deeded to Eugene Semple, and situated at the south end of the above-described land and recorded in Book V, page 64, of Records.

II. Plaintiffs allege that they are entitled to the possession of said described parcel of land; that defendant is now and has been in the possession of said land for the last six years, receiving the rents and profits thereof, and wrongfully withholds the possession of the same from the plaintiffs to their damage in the sum of one thousand dollars.

Wherefore plaintiffs pray for judgment against defendant; that the plaintiffs be adjudged to be the owners in fee of said parcel of land; that they be awarded the immediate possession thereof, and that defendant pay the plaintiffs the sum of one thousand dollars for the use and detention of said property, and that defendant pay the costs and disbursements of this action.

LEANDER HOLMES,
Attorney for Plaintiffs.

STATE OF OREGON, }
Multnomah County. }

I, L. D. Brown, being first duly sworn, say that I am one of the plaintiffs named in the above complaint; that I know the
2½ contents thereof; that the foregoing complaint is true, as I verily believe.

L. D. BROWN.

Subscribed and sworn to before me this the 9th day of July, 1884.

GEO. H. DURHAM,
[L. S.] *Commissioner of Deeds for Washington Territory, Residing at Portland, Oregon.*

(Endorsed on back:) "Filed July 10, 1884. R. G. O'Brien, clerk, by G. T. McConnell, deputy."

3 That at the November term, 1884, William Rank filed in said cause the following answer:

In the District Court of the Second Judicial District of Washington Territory, Holding Terms at Vancouver.

L. D. BROWN and LEANDER HOLMES, Plaintiffs, }
vs.
WILLIAM RANK, Defendant. }

The defendant in the above-entitled action makes answer to complaint of plaintiffs as follows:

Defendant denies that plaintiffs or either of them are or ever were owners in fee or otherwise of the land described in their complain or of any part thereof.

Denies that plaintiffs or either of them are or ever were entitled to the possession of said land or any part or parcel thereof.

Denies that defendant wrongfully withholds possession of said land or any part thereof from plaintiffs or either of them, or has at any time wrongfully withheld possession thereof from plaintiffs or either of them, to their damage in the sum of one thousand dollars or in any sum, or otherwise.

Denies that plaintiffs have or ever had an interest in or right to possession of the land described in their complaint or any part or parcel thereof.

And for further answer and separate defence the defendant alleges that for a long time prior to and at the time of the commencement of this action defendant and his wife, Kate Rank, was [were] and ever since has [have] been and now is [are] the owners in fee and entitled to the possession of the whole of the parcel of land described in the complaint, and that he [they] acquired the same by purchase and conveyance, as hereinafter set forth.

2. And for further separate answer and defence defendant alleges that neither the plaintiffs nor those under whom they claim, or any of them, were seized or possessed of the land in controversy and described in the complaint, or of any part thereof, at any time within ten years next preceding the commencement of this action, but that this defendant and those under whom he claims have been
4 continuously in the actual, exclusive, visible, and notorious possession thereof under claim and color of title in good faith for more than twenty years next preceding the commencement of this action.

That while thus in possession of said land, holding the same adversely, the defendant and wife and those under whom they claim made permanent improvements in good faith upon said land of the value at this time of $3,000, which sum the defendant claims as a set-off against any damages which plaintiffs may have sustained or may be entitled to recover by reason of the alleged withholding of possession thereof.

3. And for further answer and separate defence the defendant alleges—

That the only claim of title which plaintiffs have or make to the parcel of land described in their complaint is claimed and pretended by them to be derived through, under, and by virtue of certain quit-claim deeds executed and delivered by Grant H. Short and others, the children and heirs-at-law of Amos M. and Esther Short, deceased, to one Samuel R. Whipple, in 1877 and 1878; that at the time of the execution and delivery of said deeds and each of them the grantors were and for a long time had been out of possession of said land, and this defendant was in the actual, exclusive, visible, and notorious possession thereof under claim and color of title in good faith, and that he and those under whom he claims had been continuously so in possession of said land for more than twenty years next preceding the commencement of this action; and defendant alleges that each and all of said deeds were and are inoperative and void as against the defendant and those under whom he claims.

4. And for further answer and separate defence, and addressing

the same to the honorable judge of the above-entitled court, the defendant alleges and shows to the court—

That on or about the 19th day of January, A. D. 1853, Amos M. Short died intestate at Vancouver, in Clarke county, Oregon Territory (now Washington), leaving him surviving ten children, his only heirs-at-law, to wit, Samantha Morse, wife of Henry C. Morse; Jerusha Shockley, wife of J. P. Shockley; Druzilla Burlingame, wife of H. S. Burlingame; Amos C. Short, Maxey B. Short, Alfred D. Short, Grant H. Short, Hannah E. Short, Curtis F. Short, Matilda Lawrence, wife of Andrew J. Lawrence, and Esther Short, his widow and the mother of said children.

That in his lifetime, on the 8th day of March, 1848, the said Amos M. Short and said Esther Short, his wife, settled upon that certain tract of land in Oregon Territory known as claim No. 51, described in notification No. 446 in the office of the register and receiver at Vancouver, Clarke county, W. T., claiming the same as their donation claim under the provisions of the act of Congress entitled "An act to create the office of surveyor general of the public lands in Oregon, and to provide for the survey and to make donations to settlers of the said public lands," approved September 27th, 1850.

That the parcel of land described in the complaint in this action is a part of the west half of said donation claim allotted to the husband, Amos M. Short, by the officers of the land office at Olympia, W. T., in accordance with section 4 of said act of Congress.

That thereafter, from the said 8th day of March, 1848, the said Amos M. Short and Esther Short resided upon and cultivated said donation land claim for four consecutive years, and otherwise conformed to all the conditions of said act up to the time of the death of said Amos M. Short January 9th, 1853.

That afterwards, on or about the 4th day of October, 1853, the said Esther Short caused to be filed in the office of the surveyor general, at Oregon City, Oregon, the said notification No. 446, describing said donation land claim and showing that the said Amos M. Short was a qualified settler and competent as a married man to take said claim.

That after the death of said Amos M. Short, Esther Short, his widow, continued to reside upon said land claim until her death June 28th, 1862.

That on the 12th day of December, 1854, the said Esther Short was, by the probate court of Clarke county, Washington Territory, duly appointed administratrix of the estate of said Amos M. Short, and duly qualified as such and acted as such under letters duly issued to her by said court on December 18th, 1854, until June 9th, 1856.

That while acting as such administratrix she disposed of most of the personal property of said estate and paid all debts and claims against the same under the orders of said court.

That on the 18th day of December, 1854, the said Esther Short was by the probate court aforesaid appointed guardian of the person and estate of Maxey B. Short, Grant H. Short, Matilda Short, Han-

nah E. Short, and Alfred D. Short, the children aforesaid, who were then minors, living with the said Esther Short, in said county and on said donation land claim, and was and continued to be such guardian until June 9th, 1856.

That in 1855 it was mutually agreed by and between the said Esther Short and the aforesaid ten children of the said Amos M. and Esther Short that the east half of said donation land claim should belong to and be taken and held by the said Esther Short as her portion of said claim, and that the west half thereof should belong to and be taken and held by the ten children in equal proportions as their part of said donation claim; which said agreement was at all times and ever afterwards recognized, acted on, acquiesced in, and adhered to by each and all the parties thereto.

6 That on the 9th day of June, 1856, the said Esther Short was by the aforesaid probate court duly reappointed guardian of the person and estate of the said Maxey B. Short, Grant H. Short, Matilda Short, and Hannah E. Short, and was such guardian at the times hereinafter mentioned under letters of guardianship issued by said court.

That on the 14th day of June, 1856, J. P. Shockly was by said probate court duly appointed guardian of the person and estate of Alfred D. Short, and was such guardian and acted as such under letters of guardianship duly issued at all the times hereinafter mentioned.

That on the 9th day of June, 1856, the administration of said estate being incomplete and the said Esther Short having surrendered her letters of administration, Henry S. Burlingame, the husband of Duzilla Burlingame, was by the probate court aforesaid duly appointed administrator *de bonis non* of the estate of said Amos M. Short, deceased, and then and there qualified and entered upon the duties of his office as such administrator.

That the estate of said deceased remaining unadministered consisted of a small surplus of personal assets, and, as appeared from the inventory taken and filed by Esther Short, adm., February 12th, 1855, "land claim," appraised at four thousand dollars.

That on the 28th day of July, 1856, the aforesaid Samantha Morse and her husband, Henry C. Morse; Druzilla Burlingame and her husband, Henry S. Burlingame; Jerusha Shockley; Amos C. Short, J. P. Shockley, as guardians of Alfred D. Short, and the said Esther Short, as guardian of Maxey B. Short, and Esther Short, as guardian of said Grant H. Short, and Esther Short, as guardian of said Hannah E. Short, and Esther Short, as guardian of said Matilda Short (afterwards Matilda Lawrence), made and signed and presented to said probate court their petition, in writing, praying that partition be made of the real estate in said county of Amos M. Short, deceased, amongst his said children and heirs-at-law, so that each might have and hold his and her portion separately.

That thereupon one William Kelly was by said court duly appointed agent for Curtis F. Short, one of said children and heirs-at-law, of full age, residing in the State of Texas; that said Kelly then and there qualified as such and was authorized by said court to rep-

resent and did represent the rights and interests of the said Curtis F. Short in the subsequent proceedings and partition.

That the real estate referred to in the aforesaid petition and of which partition was desired and made, as hereinafter stated, was and is the west half of the aforesaid donation claim of Amos M. and Esther Short, No. 51, mentioned in the complaint in this action, and this was well known and understood at the time by all who
7 were interested or concerned in said partition proceedings.

That thereupon, on the 28th day of July, 1856, said petition having been considered and granted, Lewis Van Vleet, David Parker, and Levi Douthit, three disinterested persons, were appoined by said court commissioners to appraise and divide the said real estate of Amos M. Short, deceased, among his said ten children and heirs.

The said commissioners were then and there duly sworn to the faithful discharge of their duties, and a warrant was issued to them by said court, together with a notice of the appointment of the said William Kelly as agent for Curtis F. Short.

That notice was duly given by said commissioners to all persons interested in said partition, their guardians, and agents of the time when the said commissioners would proceed to make partition, to wit, August 2nd, 1856.

That on the said 2nd day of August, 1856, said commissioners met on the west half said donation claim and proceeded to make survey of the said west half and found the same to contain three hundred and twenty-one (321) acres one (1) rod and seventeen (17) perches, and appraised the same at four thousand and nine hundred (4,900) dollars.

That they then proceeded to make partition thereof and caused said west half to be divided into ten parts of equal width east and west; that said ten parts were surveyed and designated as lots numbered from lot No. 1 on the west side of the same to lot No. 10 on the east side thereof, inclusive.

That lot No. 1, containing 25 acres 1 rod and 2 perches, valued at five hundred (500) dollars, was selected by Henry C. and his wife, Samantha Morse, and was allotted to her as and for her share.

That lot No. 2, containing 26 acres 2 rods and 37 perches, valued at five hundred and fifty (550) dollars, was selected by J. P. Shockley and his wife, Jerusha Shockley, and was allotted to her as and for her share.

That lot No. 3, containing 28 acres 2 rods and 24 perches, valued at four hundred (400) dollars, was selected by the said Henry S. Burlingame and his wife, Druzilla Burlingame, and was allotted to her as and for her share.

That lot No. 4, containing 30 acres 1 rod and 15 perches, valued at fifteen hundred (1,500) dollars, was selected by the said Amos C. Short, and was allotted to him as and for his share.

That lot No. 5, containing 31 acres 3 rods and 21 perches, valued at four hundred (400) dollars, was selected by said Esther Short, as guardian for Maxey B. Short, and was allotted to him as and for his share.

8 That lot No. 6, containing 33 acres 1 rod and 4 perches,

valued at three hundred (300) dollars, was selected by J. P. Shockley, as guardian of Alfred D. Short, and was allotted to him as and for his share.

That lot No. 7, containing 34 acres 2 rods and 10 perches, valued at three hundred (300) dollars, was selected by Esther Short, as guardian of said Grant H. Short, and was allotted to him as and for his share.

That lot No. 8, containing 35 acres 3 rods and 9 perches, valued at two hundred and fifty (250) dollars, was selected by Esther Short, as guardian of the said Matilda Short (now Lawrence), and was allotted to her as and for her share.

That lot No. 9, containing 36 acres 5 rods and 34 perches, valued at three hundred (300) dollars, was selected by Esther Short, as guardian of the said Hannah E. Short, and was allotted to her as and for her share.

That lot No. 10, containing 37 acres 3 rods and 22 perches, valued at four hundred (400) dollars, was selected by the said William Kelly, as agent for the said Curtis F. Short, and was allotted to him as and for his share.

That the allotments thus made were then and there assented to by each and all of said children, their guardians, agents, and husbands and by the said Esther Short.

That on the 17th of August, 1856, said commissioners made report in writing to said probate court of their doings in the premises, showing the survey, appraisement, partition, and other matters as above set forth, with a plat thereof; which said report is now and ever since has been of record in said court.

Thereupon those of said children and heirs whose allotments were of greater value than others paid owelty to those whose allotments were of less value, and thereby made said allotments equal in value.

That the sums of money thus paid as owelty amounted to $1,080, no part of which has ever been repaid or offered to be repaid by those who received the same or by any one.

That on the 15th day of October, 1856, the said probate court confirmed said report and made a decree establishing the same, in substance as follows:

"The commissioners having awarded to the heirs of Amos
9 M. Short, deceased, certain quantities of real estate, as shown by their report now on file in this office, the heirs having agreed to the same, the court does hereby order and decree that the report and division made by said commissioners on the estate of Amos M. Short, deceased, shall be final, and that each heir named in said report shall have in their own right the property set apart to them."

That on the 18th day of October, 1856, said report, survey, plat, etc., were recorded in the auditor's office of Clarke county, Washington Territory, in Book of Deeds, and have ever since remained of record in said office.

And defendant says that the partition so made as aforesaid was fair and equal and was at said time fully and understandingly as-

sented to by each and all of the parties interested therein, and that each and all of them, as well as the said Esther Short, have ever since acquiesced therein, and by various acts and deeds done and made since said date and since all was [were] of full age and competent so to do have ratified and confirmed said partition; that each and all of them immediately after the making of said partition took possession of his and her allotment in severalty and exercised the usual acts of ownership over the same, in accordance with said partion, without objection from any one.

That in October, 1857, Samantha Morse and H. C. Morse, her husband, sold and conveyed the aforesaid lot No. 1 to one David Parker for the sum of nine hundred (900) dollars.

That in March, 1858, Jerusha Shockley and J. P. Shockley, her husband, sold and conveyed said lot No. 2 to the said Esther Short for the sum of twelve hundred (1,200) dollars.

That in April, 1865, Druzella Burlingame and H. S. Burlingame, her husband, sold and conveyed lot No. 3 to one S. R. Whipple for the sum of one thousand (1,000) dollars.

That in November, 1859, Amos C. Short and wife sold and conveyed lot No. 4 to one Leander Holmes for the sum of about three thousand (3,000) dollars.

That in June, 1867, Maxey B. Short, being of full age, sold and conveyed lot No. 5 to this defendant for the sum of eight hundred (800) dollars.

That in November, 1864, Alfred D. Short sold and conveyed lot No. 6 to Julius Suiste (subject to a mortgage previously given by said Short) for the sum of six hundred (600) dollars; which said lot No. 6 was, in January, 1875, sold and conveyed by the grantees of the said Julius Suiste to this defendant.

That the two lots last named—to wit, lot No. 5 and lot No. 6—constitute the parcel of land described in the complaint in this action and include the whole of said parcel of land.

That in April, 1865, Curtis F. Short, who was then the duly qualified and acting guardian of Grant H. Short, sold and conveyed, as such guardian, under the orders of the probate court of said county, lot No. 7 to one Nicholas Schofield for the sum of seven hundred and eighty-five (785) dollars.

That in March, 1867, Matilda Lawrence and A. J. Lawrence, her husband, sold and conveyed lot No. 8 to one Gay Hayden for the sum of six hundred (600) dollars.

That in November, 1869, the said Hannah E. Short, then of full age, sold and conveyed lot No. 9 to one James E. Wyche for a valuable consideration.

That in 1858 Esther Short, as attorney-in-fact of the aforesaid Curtis F. Short, sold and conveyed seven acres of lot No. 10 to one Rufus Ingles for five hundred (500) dollars, and in April, 1860, the said Curtis F. Short, in person, sold and conveyed the remainder of said lot No. 10 to E. A. Slocum and C. W. Slocum for twelve hundred (1,200) dollars.

That the deeds conveying said ten lots aforesaid were all recorded

in the auditor's office of Clarke county, W. T., at about the date of their execution.

That said ten lots of land mentioned, from No. 1 to No. 10, inclusive, constitue the west half of the donation claim, No. 51, of Amos M. and Esther Short, referred to in the complaint in this action, and of which partition was made as aforesaid in 1856.

Defendant further says that on the 26th day of May, 1860, the map of the survey of public lands, including said donation claim, was duly approved by the surveyor general of said Territory, and on the 19th day of June, 1860, the final proofs of settlement, residence upon and cultivation of said donation claim by the said Amos M. Short and Esther Short, and of their compliance with the conditions of the aforesaid act of Congress were duly made and filed in the office of the register and receiver at the land office in Olympia, W. T., and on the 31st day of July, 1874, a donation certificate, No. 275, was issued by said register and receiver, in and by which the west half of said claim was assigned to the husband, the said Amos M. Short, and the east half thereof to the wife, the said Esther Short, who died June 28th, 1862.

That on the 13th day of October, 1877, a patent from the
11 United States under the aforesaid act of Congress was duly issued to said Amos M. Short and Esther Short for said donation claim, in and by which the west half was given and donated to the said Amos M. Short and to his heirs, and east half to the said Esther Short and to her heirs.

That each and all of the aforesaid children and heirs-at-law who were represented by guardian at the times hereinbefore stated were minors at said times, but that each and all of them arrived at the age of majority more than twelve years ago.

Defendant further says that the alleged title of plaintiffs is derived from, under, and through the said Amos M. Short and Esther Short and their heirs, and by virtue of the title acquired by them as donees of the United States under the act of Congress hereinbefore mentioned and not otherwise.

Wherefore defendant prays that inquiry may be made into the matters and things herein alleged and set forth, and if upon such inquiry said matters and things shall be found to be true, then that the defendant and his said wife may be adjudged to be the legal and equitable owners of the parcel of land described in the complaint and entitled to the possession thereof; that plaintiffs have no title, and that they take nothing by their said action, or that such other or further judgment or decree may be rendered as may be just and proper in the premises, and that defendant have judgment for his costs and disbursements.

B. F. DENNISON,
Attorney for Defendant.

TERRITORY OF WASHINGTON, }
County of Clarke. }

I, William Rank, being duly sworn, say that I am the defendant in the above-entitled action; that I have read the foregoing answer,

and that the matters and things therein stated and set forth are true, as I believe.

WILLIAM RANK.

Subscribed and sworn to before me this 31st day of October, 1884.

G. T. McCONNELL,
Deputy Clerk.

(*Demurrer.*)

WASHINGTON TERRITORY, }
County of Clarke. }

In the District Court of the Second Judicial District of Washington Territory, Holding Terms at Vancouver. November Term, 1884.

L. D. BROWN and L. HOLMES, Plaintiffs, }
vs.
WILLIAM RANK, Defendant. }

12 And now come the plaintiffs and demur to the second, third, and fourth separate answers and defences of defendant herein, for the reason that they do not state facts sufficient to constitute a defence to this action.

LEANDER HOLMES,
Attorney for Plaintiffs.

This demurrer was overruled by the district court.

L. D. BROWN *et al.*, Plaintiffs, }
vs.
WILLIAM RANK, Defendant. }

"This case coming on for hearing upon demurrer to the answer, and having been submitted to the court on briefs of counsel of plaintiffs and defendant, and the court, having fully considered the questions presented by the pleadings on file in this case, overrules the demurrer to the answer; to which ruling or decision the counsel for plaintiffs then excepted and gave notice of his intention to appeal; and the counsel for plaintiffs having elected to stand upon the ruling of the court upon said demurrer and not to reply or further plead to the answer, the case is now here dismissed with costs against the plaintiffs, to be taxed, and that execution issue therefor. Whereupon counsel for plaintiffs excepted and gave notice of appeal to the supreme court."

In the District Court of the 2d Judicial District of Washington Territory, Holding Terms at Vancouver.

L. D. BROWN and L. HOLMES, Plaintiffs, }
vs.
WILLIAM RANK, Defendant. } Notice of Appeal to Supreme Court.

To the defendant, William Rank, and his attorney:

Please take notice that the above-named plaintiffs appeal to the next supreme court of the Territory of Washington, to be held at

Olympia, from the ruling and judgment of said district court in the above-entitled case, entered in the journal of said court on the 13th day of November, 1884, by which it was by said court ordered that the demurrer of plaintiffs to the answer of defendant be overruled, and that the plaintiffs be adjudged to pay the costs of suit, to be taxed, and that execution issue therefor, and plaintiffs state and set forth the following as the grounds of their appeal:

1st. That the court erred in overruling the demurrer of plaintiffs to the answer of defendant in the above case.

13 2. That the court erred in dismissing said case and adjudging that plaintiffs pay the costs of said suit, to be taxed, and that execution issue therefor.

Wherefore, for each and all of said errors as above assigned, the plaintiffs appeal the above-entitled case from the ruling and judgment as rendered by said district court to the supreme court of the Territory of Washington for July term, 1885.

LEANDER HOLMES,
Attorney for Plaintiffs.

(Endorsed on back:) "Filed April 20, 1885. R. G. O'Brien, clerk, by G. T. McConnell, deputy."

That at the July term, 1885, of said supreme court, to which said cause was appealed under the act of November 23d, 1883, the appellee, by his attorney of record, filed the following motion to dismiss the appeal:

14 In the Supreme Court of Washington Territory.

L. D. BROWN and LEANDER HOLMES, Appellants,
vs.
WILLIAM RANK, Appellee.

Motion.

The appellee, appearing specially for the purpose of this motion and not otherwise, moves to dismiss the appeal for the following reasons:

1st. Because the action is an action at law and the questions raised by the demurrer and decided by the district court are purely questions of law which can be re-examined by this court only on writ of error.

2d. Because no judgment, order, or decision was made or entered in the case which can be reviewed by this court on appeal.

3d. Because the appeal is not taken in the manner prescribed by the statute.

B. F. DENNISON,
Attorney for Appellant.

Opinion.

" In the Supreme Court of the Territory of Washington. July Term, 1885.

L. D. BROWN *et al.*, Appellant,
vs.
WILLIAM RANK, Defendant.

By the COURT:

Gazing at this motion to dismiss, we see but a single question necessary to its decision, namely, whether this cause is to be deemed one in equity or one at common law. Our rules require an assignment of errors in a law but none in an equity cause. Dismissal of the appeal would be the natural sequence of holding this to be a cause at law, for there is no assignment of errors here. We gather from the record that the appellants, who were plaintiffs below, are seeking to open up a judgment rendered upon overruling a demurrer to the answer. In answering, defendant, besides denials, pleaded four affirmative defenses, to the three last of which plaintiff interposed a limping demurrer. Legal and not equitable all these defenses are conceded to have been, unless the fourth, which was addressed to the judge, and was apparently intended as a plea of equitable estoppel Let the intent as to the last have been what it may, 'the matter pleaded did not, in our opinion, display facts sufficient to constitute a defense of any description.' Jurisdiction is to be determined by presuming everything to be of common law cognizance. Until the necessity of invoking equitable jurisdiction appears, unless we are to give an unreasonable force to the address of the fourth defense to the judge, we are unable to see any necessity for him to act in the capacity of chancellor in deciding the demurrer. Decision of the demurrer was, we think, a decision at law. Getting the cause here for review of that decision is a proceeding in the nature of a writ of error. Errors, therefore, should have been assigned conformably to rule 5th. Appeal dismissed.

ROGER S. GREEN, *C. J.*
S. C. WINGARD AND
GEORGE TURNER,
Associate Justices."

Judgment on Motion to Dismiss.

In the Supreme Court of Washington Territory. July Term, A. D. 1885.

Be it remembered that at a regular term of the supreme court of Washington Territory begun and holden at Olympia on the second

Monday of July, A. D. 1885, it being the 13th day of said month, among other, the following was had and done, to wit:

JULY 18TH, 1885.

L. D. BROWN and LEANDER HOLMES, Appellants,
vs.
WILLIAM RANK, Appellee.

This cause having been heretofore submitted to the court upon the transcript of the record of the district court of the second judicial district of Washington Territory, holding terms at Vancouver, the motion to dismiss the appeal, and the argument of counsel, and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing, it is now, on this 18th day of July, A. D. 1885, on motion of B. F. Dennison, Esquire, of counsel for appellee, considdered, adjudged, and decreed that the appeal from the judgment of the district court be, and the same is hereby, dismissed, with costs.

And that the said William Rank recover of and from the said L. D. Brown and Leander Holmes the costs of this action, taxed and allowed at $43.15, *dollars* and that execution issue therefor; to which ruling of the court appellant excepts, and said exception is allowed.

17 *Journal Entries.*

Supreme Court, W. T.

L. D. BROWN and LEANDER HOLMES
vs.
WILLIAM RANK, Appellee.

JULY 22D, 1885.

The court, having in this cause heard the argument of counsel upon the motion to strike the petition for a rehearing filed herein, and being now fully advised in the premises, denies said motion.

L. D. BROWN *et al.*
vs.
WILLIAM RANK.

JULY 31ST, 1885.

In this cause the court, having fully considered the petition for rehearing by the appellants filed herein, and being now fully advised in the premises, denies the same. It is therefore ordered that the petition be, and the same is hereby, denied.

18 Supreme Court of the United States.

L. D. BROWN and L. HOLMES, Plaintiffs,
vs.
WILLIAM RANK, Defendant.

Know all men by these presents that we, L. D. Brown and L.

Holmes, as principals, and E. R. Brown and S. R. Whipple, as sureties, are held and firmly bound unto William Rank, of Vancouver, Washington Territory, in the sum of two hundred dollars, to be paid to the said William Rank, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this the 7th day of July, 1886.

Whereas the above-named L. D. Brown and —— Holmes hath taken an appeal in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of Washington Territory:

Now, therefore, the condition of this obligation is such that if the above-named L. D. Brown and —— Holmes shall prosecute their appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

Sealed and delivered.

LORENZO D. BROWN. [L. S.]
LEANDER HOLMES. [L. S.]
EMMA R. BROWN. [L. S.]
SAMUEL R. WHIPPLE. [L. S.]

19 UNITED STATES OF AMERICA, } ss:
Portland, Oregon, }

Lorenzo D. Brown and Emma R. Brown, of Portland, Oregon, being duly sworn, depose and say, and each for himself and herself saith, that they, each, are worth the sum of three thousand dollars over and above all their just debts and liabilities.

Signed LORENZO D. BROWN.
EMMA R. BROWN.

Subscribed and sworn to before me this the 15th day of July, 1886.

[Seal Commissioner of Deeds.]

GEO. H. DURHAM,
Commissioner of Deeds for Washington Territory, at Portland, Oregon.

UNITED STATES OF AMERICA, } ss:
Vancouver, Washington Territory, }

Samuel R. Whipple, of Vancouver, W. T., being duly sworn, deposes and says for himself that he is worth the sum of three thousand dollars over and above all his just debts and liabilities.

(Signed) SAMUEL R. WHIPPLE.

Subscribed and sworn to before me this the 16th day of July, 1886.

[NOTARIAL SEAL.] JOHN W. COCHRAN,
Notary Public in and for Clarke County, W. T.

20 (Endorsed on back:) In the Supreme Court of the United States, for the October term, 1886. L. D. Brown and —— Holmes *vs.* William Rank. Bond for costs. I hereby approve the within bond and the sureties therein named. Olympia, July 21st, 1886. John P. Hoyt, associate justice of the supreme court of Washington Territory.

21 *Citation to Supreme Court.*

UNITED STATES OF AMERICA, *ss:*

To William Rank, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the supreme court of the Territory of Washington, wherein L. D. Brown and Leander Holmes are appellants and you are appellee, to show cause, if any there be, why the ruling and judgment rendered by the supreme court therein should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable John P. Hoyt, associate justice of the supreme court of said Territory, this the 21st day of July, in the year of our Lord one thousand eight hundred and eighty-six.

JOHN P. HOYT,
Associate Justice of the Supreme Court of the Territory of Washington.

22 I hereby acknowledge the receipt of a copy of the within, and hereby waive all further citation and notice in the above-entitled cause.

July 26th, 1886.

WILLIAM RANCK, *Appellee.*

[Endorsed:] In the Supreme Court of the United States, for the October term, 1886. L. D. Brown *et al.*, appellants, *vs.* William Rank, appellee. Citation. Original.

[Stamped:] Received & filed Jul- 29, 1886. R. G. O'Brien, clerk.

23 In the Supreme Court of W. T. July Term, 1885.

L. D. BROWN and LEANDER HOLMES
vs.
WILLIAM RANK.

I, R. G. O'Brien, clerk of the supreme court of Washington Terri-

tory, hereby certify that the annexed writings and printing are a true copy of the record in said cause upon which the same was tried and determined in this supreme court as the same now appears of record in my office, at Olympia; and I further certify that it contains all the journal entries of record in said cause and court.

Witness my hand and the seal of said court this 13th day of September, A. D. 1886.

Seal Supreme Court, Washington Territory.

R. G. O'BRIEN, *Clerk.*

Endorsed on cover: Washington Territory supreme court. No. 99. L. D. Brown and Leander Holmes, appellants, *vs.* William Rank. Filed September 29, 1886.

IN THE

Supreme Court of the United States.

October Term 1887.—No. 989.

L. D. BROWN ET AL., *Appellants*,

vs.

GEORGE T. McCONNELL, *Appellee.*

Appeal (?) from the Supreme Court of Washington Territory.

Motion of McConnell to Dismiss or Affirm.

Comes the said McConnell, and moves the Court to dismiss the appeal herein, as this Court has no jurisdiction thereof; or to affirm the judgment, it being manifest that even if the Court possesses jurisdiction, the question on which the jurisdiction depends is so frivolous as not to need further argument.

STATEMENT OF THE CASE AND BRIEF ON MOTION.

This was an action for the possession of real estate and for damages—$800 for rents, &c.—begun in the District Court of the second judicial district of the Territory of Washington (Rec., 3). Answer to the merits was filed, and demurrer to it interposed, and the demurrer overruled; and plaintiffs stood on the demurrer and appealed to the Supreme Court of the Territory (Rec., 11 and 12); and in

that Court the appeal was dismissed, on motion of McConnell (Rec., 12 and 13); this alleged appeal is prosecuted from that decision.

1st. In the first place, this case was docketed here and dismissed under rule 9 of this Court on the 23d of May last (122 U. S., p. 648, Appendix); and how it finds its way back here is not clearly understood, as under that rule it could not get back without an order of Court. I am not aware of any order of Court allowing it to be put back on the docket, nor was I notified of any motion being made to have it redocketed. If a party can thus keep on appealing and docketing his case, after it has been dismissed under rule 9, without notice or order of Court, the rule is a snare.

This is sufficient to dispose of the motion to dismiss, but there are other points as fatal.

2d. This was a suit at law, and not in equity. Although in language, following the modern codes on this subject, it was for *possession* of real estate, to all intents and purposes it was an action of ejectment (*Greer* v. *Mezes*, 24 *How.*, 268). It asked for possession of land and for damages. This being the case, the questions involved cannot come up on appeal, but on writ of error only (*Rev. Stats., secs.* 691–2; *Hayes* v. *Fischer*, 102 *U. S.*, 121; *Sarchet* v. *U. S.*, 12 *Pet.*, 143; *Jones* v. *La Vallette*, 5 *Wall.*, 579); and when this Court, in *Ex parte Brown*, 116 *U. S.*, 401, said, "this is a judgment which can only be reviewed by writ or appeal, *as the case may be*," it could have meant only, that a writ of error was the one and exclusive remedy.

There was no trial of the case on issue, but a dismissal in the District Court, on plaintiffs' standing on their demurrer to the answer, an appeal from that to the Supreme Court of the Territory, and then a dismissal of that appeal on motion of McConnell; and from that, this appeal. It is a case of law, as has been seen; and if issues had been

taken on the answer, it would have been a case proper for a jury trial. If, then, a jury had been waived, or if, by any means, the Court should have tried the case, it would come under the act of April 7, 1874, c. 80, sec. 2, 18th Stats., 27, and cases decided on it—(*Story* v. *Black*, 119 *U. S.*, 235, and cases cited). The word *trial* in this act must be held to its well-known legal signification—that is, the examination, according to law, of the facts put in issue in a cause for the purpose of determining such issue (2 *Bouv. L. D.*, 749, and authorities referred to). There was no such examination had in this case, and no appeal from any such examination is presented here; hence the act of 1874 does not affect this case.

3d. The damages claimed in the case are $800; and, beyond this, there is no showing what value in money is in controversy. The amount of land claimed is thirty-five acres, "*more or less;*" but no value is affixed or asserted, nor any proved; and the so-called appeal should be dismissed, as it does not appear the matter in dispute is over $5,000, exclusive of costs. (See act 3d of March, 1885, 23 Stats., p. 443.) The judgment attempted here to be appealed from was rendered July 18, 1885—four months and a half after the passage of this act—and the appeal attempted in November, 1886—a year and eight months after that time.

4th. The effort at an appeal here is a meagre one at best. There seems to be no prayer filed for it in the Court, indorsed by the clerk, nor any granting of it in form by the Court. One of the associate judges approves a bond in July, 1886, and signs a citation in November, 1886; and this is all of it; and this, while a proposed appeal is already had and papers sent, but not docketed, to this Court. If an appeal can be tolerated in such a case, as an original question, this proceeding might be considered as an appeal (*Brandies* v. *Cochrane*, 105 *U. S.*, 262); but it cannot be

permitted while an appeal is already being prosecuted in the same case. Doubts were entertained when the motion was made at the last term, to docket and dismiss the case, whether there was an appeal in fact. This effort is no better than that; and surely, as the record was already out of the Court below, as claimed by appellants, how could the associate justice sign another citation and approve another bond? So, in point of fact, in good practice there is no appeal here if one were allowable in such a case, which we have seen is not.

Should the Court, however, deem that there is something here to hold on to, and it is not proper to dismiss the case, an affirmance is asked, as it is apparent the question is so frivolous as not to need further argument. It is purely a question of code practice in the Territory of Washington, and is so simple the Court below disposed of it almost summarily. It was dismissed by the Court below after *brief* argument. (Record, 12 and 13.) This Court would scarcely undertake to review the Court below on a mere matter of local practice, involving rights of private parties only.

The opinion of the Court below shows how empty the question really is. Look at it for a moment.

The causes alleged for dismissal below are—

1. Because the action is an action *at law*, and the questions raised by the demurrer and decided by the District Court are purely questions of law, which can be re-examined by this Court only *on writ of error*.

2. Because no judgment, order, or decision was made or entered in the case which can be reviewed by this Court *on appeal*.

3. Because the appeal is not taken in the manner prescribed by the statute. (Rec., 12.)

(1.) Section 445 of the Code of the Territory provides—

"Every final judgment, order, or decision of a District

Court in actions at law * * * may be re-examined by a writ of error in the Supreme Court, for error in law."

* * * * * * * *

"Every final judgment, order, or decision of the District Court, in actions of an equitable nature, where equitable relief is sought, or where chancery jurisdiction has been exercised, shall be reviewed in the Supreme Court by appeal"—similar to the practice in this Court.

An action to recover possession of real estate, and damages for the withholding thereof, is certainly an action at law. (24 How., *supra.*)

(2.) The second defense contains a plea of the Statute of Limitations under section 26 of the Code, and a demurrer thereto presents a question of law, and nothing else.

(3.) The third defense invokes the application of a principle of the common law to a conveyance of land held adversely at the time of the execution and delivery thereof by one disseized, and a demurrer to such defense presents a pure question of law.

(4.) The fourth defense alleges facts tending to show that the defendant and wife have both the legal and equitable title to the land described in the complaint.

Do the facts alleged in this defense show that the defendant has the legal title to the land in controversy?

Do they show that the title to the donation claim vested in Amos M. and Esther Short prior to 1853, by virtue of his compliance with the conditions of the act?

Do they show that the agreement for the division of the claim between the widow and children was carried into execution and became valid and binding in law?

Do they show that the alleged partition of the west half of the claim in 1856, became valid and binding in law prior to the execution and delivery of the Whipple deeds?

Do the facts alleged show that the defendant and his wife acquired title to the lot of land in question by conveyances from Matilda Lawrence and her husband and their

grantees, prior to the execution and delivery of the Whipple deeds?

These are all questions *of law*, and a decision of them by the District Court can be re-examined in the Court below and in this Court on *writ of error*, and in no other way.

(5.) The plaintiffs ask for no equitable relief, and no chancery jurisdiction has been exercised in the case.

Writs of error as distinguished from appeals were not, and could not be abolished by the act of November 23, 1883.

The act provides the *mode* of taking an appeal in cases where appeal, and not writ of error, is the appropriate proceeding for removing a cause from the District Court to the Supreme Court for review.

The mode of prosecuting a writ of error remains the same as it was previous to the act of 1883.

This motion is asked to apply to 987, *Holmes* v. *Hazzard*, and 668, *Holmes* v. *Rank*, on this docket, with like effect as if made formally in them—cases growing out of the same state of facts and involving precisely the same questions. But the Record is printed in this, and the motion made directly in it, as it presents the one different question from the others—that is, two efforts at appeal, one docketing and dismissal, and a docketing afterwards.

A. H. GARLAND,
For Mc Connell.

IN THE

Supreme Court of the United States.

October Term, 1887.

L. D. BROWN *et al.*, Appellants,
vs.
MCCONNELL, Appellee. } No. 989.

SAME
v.
WM. RANCK. } No. 987.

SAME
v.
WM. HAZARD. } No. 668.

Additional Brief for Appellees as to Affidavits filed herein by Appellants on the 4th of January, 1888.

These affidavits come in at rather a late day, considering the notice of the motion to dismiss was mailed to Mr. Holmes, at Vancouver and Portland both, as early as the 2d day of November last.

And they do not vindicate any show of proper diligence in prosecuting these appeals, on complete records, when it is kept in mind these appeals, so called, were taken as far back as July, 1885; and they are so at variance with any fact apparent in the record, and even any fair implication to be drawn from the facts therein,

it is doubtful whether these affidavits are admissible. They certainly come short of the practice so highly commended by the Court in *Wilson* v. *Blair*, 119 U. S., 387. Affidavits were not filed in the Court below, even after the alleged appeals were taken, as was done in *Street* v. *Ferry*, 119 U. S., 385, where upon the ground itself from which this litigation comes every opportunity would have been afforded to both sides to protect themselves.

Attention is called particularly to the affidavit of Mr. Holmes as to the McConnell appeal (No. 989). Had this affidavit been filed with motion to reinstate the appeal, or to present the appeal anew, it might have been considered, but it is filed now after the appeal has been docketed, and without any order, or any request to that effect. This request and order before docketing the appeal are absolute pre-requisites (Rule 9, section 1, last paragraph). It was in this way that *Stewart* v. *Dunham*, 115 U. S., 61, was put back on the docket, and many other cases might be cited in this line.

And no notice was required to dismiss the first appeal, under Rule 9; the dismissal went as a matter of course under that Rule. So there can be no pretense of keeping this appeal on the docket, unless Rule 9 is to be read out and put an end to, and the only limit to an appeal is to be fixed by the desire of a party.

Respectfully submitted.

A. H. GARLAND,
Attorney for Appellees.
W. W. UPTON,
Attorney for Ranck.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

IN CASES OF

L. D. BROWN *et al. vs.* GEORGE T. McCONNELL, No. 989.

L. D. BROWN *et al. vs.* WILLIAM C. HAZARD, No. 987.

L. D. BROWN *et al. vs.* WILLIAM RANCK, No. 668.

On Appeals from the Supreme Court of Washington Territory.

REPLY OF APPELLANTS ON MOTIONS TO DISMISS OR AFFIRM.

Now come the above appellants and make their reply to the motions to dismiss the appeals herein, or to affirm—

1st. Because this Court has jurisdiction of these causes on *appeal.*

2d. Because the questions on which jurisdiction depends are not frivolous.

Statement.

These causes were brought for the possession of real estate and damages for the withholding the same, begun in the District Court of the Second Judicial District of the Territory of Washington. An answer to merits was filed and demurrer to it interposed and the demurrer to it overruled, and plaintiffs stood on the demurrer and appealed to the Supreme Court of the Territory under an act in relation to the removal of causes to the Supreme Court, approved Nov. 23d, 1883. (See Rec., p. 12.)

Laws of Washington Territory regarding Appeals and Writs of Error.

"Section 1. *Be it enacted by the Legislative Assembly of Washington Territory,* That any person desiring to remove *a cause* from

any District Court of Washington Territory may do so, either in person or by his attorney of record, and in the following manner: Such person or attorney may give *notice in open Court*, or at chambers, that he appeals such cause to the Supreme Court of the Territory. Such notice shall, by order of the Court or judge having jurisdiction of the cause, be entered in the journal of such Court, *and no other service or notice of process shall be required*, and *thereupon* the clerk of such Court shall make and certify a full and complete transcript of said cause, including the journal entries thereunto appertaining, and cause such transcript to be filed with the clerk of the Supreme Court within the time allowed by law; and thereupon the *Supreme Court* shall have *complete* and *perfect jurisdiction of such cause.*

"Sec, 2. That the Supreme Court shall hear and determine all causes removed thereto in the manner hereinbefore provided, *upon the merits thereof*, disregarding *all* technicalities.

"Sec. 6. All acts and parts of acts, so far as they conflict herewith, are hereby repealed."

Approved November 23d, 1883. (Rec., p. 12.)

Sec. 83 of the Code of said Territory authorizes the pleading of legal or equitable defences, or both, in the same suit.

Sec. 76 of the Code says that when a plea is addressed to the judge of the District Court where the action is brought, the relief sought is of an *equitable* nature.

Sec. 445 of the Code says: "That where *equitable* relief is sought or *chancery* jurisdiction has been exercised, the cause *shall* be *reviewed* on *appeal.*"

The Code does not require that the equitable relief sought should be a *good plea*, a *sufficient plea*, or prove an *effectual plea.*

The 4th separate answer and defence was addressed to the judge of the District Court as a bill in equity seeking equitable relief.

The *overruling* of the demurrer by the District Court sustains the *equitable* defence, and thus the District Court did necessarily act in the capacity of *chancellor.* Thus because equitable relief was sought (by the defence) and chancery jurisdiction was exercised, plaintiffs below were required by the *Code*, sec. 445, to take this case to the Supreme Court of the Territory by appeal to secure its review.

We first call attention of the Court to the above provisions of the code and statute of 23d November, 1883, to show what the

laws of the Territory are in regard to the mode or method by which causes *shall* be removed to the Supreme Court of the Territory.

But notwithstanding all this the Supreme Court of the Territory did dismiss said appeals, on motion of appellees, because, as the Court held:

"Getting the cause here for review was a proceeding in the nature of a *writ of error*. Errors, therefore, should have been assigned. (Rec., pp. 12, 13.)

From which ruling and decision this cause is brought *here* by *appeal* for review—of the ruling on dismissal. Doubtless these motions can raise no question in regard to the merits; and this Court will not enter into nor consider the merits of these cases, except in so far as may be required to pass on the sufficiency of these appeals.

Now, these appellees interpose their motions to dismiss the respective *appeals*, because they should have been brought here by writ of error—claiming them to be cases at law under the code. Appellants claim that the case No. 989, nor case No. 987, nor that of No. 668 can be dismissed on that ground, for the reasons:

1st. In all of the Territories the statute of the United States affirms and validates the mingling of legal and equitable rights in the same action, and provides that in cases tried by jury the case shall be reviewed by *writ of error*, and all *others* by appeal. (See act of 7 April, 1874, c. 80, sec. 2, 18 Stats., 27.)

2d. Opinions of the Supreme Court. In the case of *Height* vs. *Broughton*, 105 U. S. R., p. 235, this Court held "that the form of proceeding depends on the *single* fact of whether there has been a trial by *jury* or not. Cases tried by *jury* come here by writ of error and all *others* by *appeal*."

3d. In the case of *Wolf* vs. *Hamilton*, 108 U. S. R., page 15, this Court held that a "case not tried by a jury cannot come here by writ of error."

This certainly establishes our right to bring these suits *here* by appeal.

Trial, Meaning of

There was a trial on the issue made before the District Court on demurrer, (Rec., p. 12,) and there was also a *trial* on the *de-*

murrer by the Supreme Court. Said Court, after *eliminating* the equitable defence and fourth separate answer, (on appellee's motion to dismiss,) because said "equitable defence did not display facts sufficient to constitute a defence of *any description*," then holds the actions were but actions at law and should be dismissed because errors were not assigned. Thus holding appellants to blame for the stupid pleading of appellees. (Rec., pp. 12, 13.)

These were trials by *inspection* or *examination* of the pleading and record, and is a *form* of *trial* in which the judge of the Court, upon the evidence of his own senses, decides the question in dispute. (Bouv. L. D., 2 vol., p. 611.)

Now, as to the Dismissal.

It is not true that this case, No. 989, for the October term, 1887, was docketed here and dismissed under rule 9 of this Court. But it is true that an attempt to take an appeal of this case for the October term, 1886, was dismissed, as alleged.

This appellant says the reason why said appeal of July, 1886, was not sent here and docketed in time, as required by law and the rule, was because the clerk of the Supreme Court below did not make out a certified transcript of the record, although his fees were sent him, which *contumacy* on the part of the clerk compelled these appellants to abandon their first attempt to get the case here. Then they resorted to a second appeal of November 17, 1886, for the *October Term*, 1887. This second appeal was also made in the case of L. D. Brown *et al. vs.* William C. Hazard, No. 987, the clerk failing to furnish the record for the October term, 1886. (See affidavit appended hereto, last page.)

This contumacy of the clerk certainly does not and should not debar these appellants from taking a *new* appeal, as they have in No. 989 and No. 987.

The third point claims that no value is affixed or asserted, therefore the case should be dismissed.

Reply.

This appellant says that at the time he made out the transcripts in these causes he did append his affidavit to each transcript; that the value of the land was more than $5,000 exclus-

ive of costs, and enclosed one in each transcript when sent to the clerk for his certificate, and appellant cannot account for their absence from the record.

To supply the same this appellant has filed with the clerk of this Court affidavits of value in all these cases, as follows:

In the Supreme Court of the United States, October term, 1887, No. 989.

L. D. Brown *et al.*, *Appellants*,

vs.

George T. McConnell, *Appellee.*

On appeal to the Supreme Court of the United States.

I, L. D. Brown, of Portland, Oregon, being sworn, depose and say: That I am one of the appellants in the above action; that I am acquainted with the value of the land in controversy on the 18th day of July, 1885, and have been since that time; that the value of said land at that time was not less than ten thousand dollars, exclusive of all improvements and costs; that it has increased in value since that time.

Signed, L. D. BROWN.

PORTLAND, OREGON.

Subscribed and sworn to before me this the 14th day of December, A. D. 1887.

[Official seal.] SHERMAN D. BROWN,
Notary Public for Oregon.

In the Supreme Court of the United States, October term, 1887, No. 989.

L. D. Brown *et al.*, *Appellants*,

vs,

George T. McConnell, *Appellee.*

On appeal to the Supreme Court of the United States.

Affidavit as to value.

I, O. H. Mott, of Vancouver, Washington Territory, being sworn, do depose and say: That I was acquainted with the land in controversy in this action for many years past, (35 acres,) and that the value of said land on the 18th day of July, 1885, was worth more than ($5,000) five thousand dollars, beyond all costs and disbursements of said action, and over and above improvements thereon, and is increasing in value.

Signed, O. H. MOTT.

PORTLAND, OREGON.

Subscribed and sworn to before me this 14th day of December, A. D. 1887.

[Official seal.] SHERMAN D. BROWN,
Notary Public for Oregon.

In the Supreme Court of the United States, October term, 1887, No. 987.

L. D. Brown *et al.*, *Appellants*,

vs.

William C. Hazard, *Appellee*.

On appeal to the Supreme Court of the United States.

Affidavit as to value.

I, L. D. Brown, of Portland, Oregon, being sworn, do depose and say: that I am one of the appellants in the above action; that I am acquainted with the land in controversy (45 acres) and that the value of said lands on the 18th day of July, 1885, was not less than ($15,000) fifteen thousand dollars, exclusive of improvements and costs; that said land has increased in value since said date.

Signed, L. D. BROWN.

PORTLAND, OREGON.

Subscribed and sworn to before me this 14th day of December, A. D. 1887.

[Notarial seal.] SHERMAN D. BROWN,
Notary Public for Oregon,

In the Supreme Court of the United States, October term, 1887.

L. D. Brown *et al.*, *Appellants*,

vs

William C. Hazard, *Appellee*.

On appeal to the Supreme Court of the United States.

Affidavit of value.

I, R. S. Oakley, of Portland, Oregon, being sworn, do depose and say: That I am acquainted with the land in controversy in this action, and have been for many years past, (being 45 acres, in possession of Wm. C. Hazard,) and I know that the value of said land on the 18th day of July, 1885, far exceeded five thousand dollars, over and above all costs and disbursements of this action, and of improvements thereon, and is increasing in value since said date.

Signed, R. S. OAKLEY.

PORTLAND, OREGON.

Subscribed and sworn to before me this the 14th day of December, A. D. 1887.

[Notarial seal.] SHERMAN D. BROWN,
Notary Public for Oregon.

Appellee claims the effort at an appeal is a meagre one at best, There is no prayer for it indorsed by the clerk and filed in court, nor any granting of it in form by the Court.

All this is not required. To take an appeal is a right a party has—not dependent upon the wish or will of a contumacious clerk; for, in the case of Brandies *vs.* Cochrane, 105 U. S. R., page 262, this Court has held as follows:

"That an appeal may be perfected without an order of Court formally allowing it. It is in legal effect allowed when the circuit judge takes the security and signs the citation."

Appellee admits this was done, but then says, "and this while a proposed appeal is already had and *papers sent*, but not docketed, to this Court."

We deny all this. The appellants *did not send any papers or transcript* here in this case in their first effort to appeal, because of the *contumacy* and neglect of the clerk to make the transcript out, it being too late to get the record here in time for the October term, 1886. But thereafter this appellant made out the *record himself*, and took out a *new appeal* on the 17th day of November, 1886, for the October term of 1887, (citation, Rec., p. 2,) and this appellee and the clerk knew it at the time, and knew that these new appeals were made because of the failure of the clerk to furnish the transcripts for the October term, 1886, appellants not knowing of the attempt to docket and dismiss the abandoned appeal of July, 1886, by G. T. McConnell until long after it was done, the Supreme Court clerk, R. G. O'Brien, retaining the *prepared transcripts* in his hands until he was sure the dismissal would take place.

This is about as nefarious and fraudulent an affair as occurred in the case of the United States *vs.* Gomez, 23 How., p. 326, and appellee should be punished by this Court in directing that the mandate for costs shall be recalled.

We hardly think such proceedings are sufficient to justify the dismissal of this independent and *new appeal.*

But appellee asks (if the Court cannot dismiss this appeal) an affirmance be granted, as it is apparent the question is so *frivolous* as not to need further argument. In what respect frivolous? It

does not seem very frivolous in view of the unusual efforts to prevent a hearing on the merits, for he well knows upon the questions involved in these cases depends real estate of the value of $50,000. It must be quite frivolous to them, indeed.

The very grounds on which this Court may not dismiss are sufficient to prevent an affirmance.

To ask this Court to *affirm* a judgment below, based upon an opinion wherein the Court denies its jurisdiction for a purpose and entertains jurisdiction for other purposes, is, to say the least, making an extraordinary request of this Court. The whole opinion of the Court below is a violation of the laws of Washington Territory, as heretofore shown. (Brief, p. 1—.) ✕ 2

We hold that these cases, although brought as an action at law, were under the Code (sec. 445) transformed to a cause in chancery by the interposition of the 4th separate answer or equitable defense, which is in the nature of a cross-bill seeking equitable relief against legal title. Hence, where the law authorizes the mingling of law and equity in one suit the same rules are to be applied as if the suit was begun in equity. (Sower *vs.* Weaver, 78 Penn. St., 443; Williams *vs.* Murphy, 21 Minn., 534.)

No Court has the *power* or authority (on a motion to dismiss) to *eliminate* from the answer an equitable defence in Washington Territory in order to hold that the cause was *then* only an action at *law*, as a *pretext* for *dismissal* of the *appeal*, because of the insufficiency of the plea to constitute a defence. Such a ruling amounts to turning appellants out of Court because of the erroneous pleading of appellee.

Such an opinion would be laughable were it not serious; but this is what the Court below did. (Rec., pp. 12–13.)

The Court below *denies* its jurisdiction, then *exercises* jurisdiction, thus admitting jurisdiction. All this by its transcendent power of "*gazing*."

In *ex parte* Brown, 116 U. S., p. 401, this Court held in these cases (on petition for mandamus) "that the Court below *entertained* jurisdiction, * * * and therefore these causes could only come here for review by writ of error or appeal, as the case may be."

Therefore, under the decisions of this Court, in the case of Height *vs.* Broughton, 105 U. S., 235, and Wolf *vs.* Hamilton, 108 U. S., 15, we brought these cases here for review by *appeal.*

But the counsel *sees fit* (on this motion to dismiss) to call the attention of this Court to the merits or the character of the 2d, 3d, and 4th separate answers and defences; and as to the 4th, the counsel asks five questions, to which we answer as follows:

To the 1st, we answer, No!

To the 2d, we answer, No!

To the 3d, it did not become valid.

To the 4th, we answer, No!

To the 5th, they acquired no title.

All these questions pertain to the cases when tried on the *merits* by the Court below, before whom we seek to have them tried.

This Court is only now called on to decide on the sufficiency of this *appeal*, and nothing more.

Therefore, appellants claim the right to have the demurrers passed upon their *merits* by the Court below that the issues to be tried shall be settled.

To that end we bring these appeals here to review the ruling, dismissal, and judgment of the Supreme Court below in these causes.

In the Case of L. D. Brown et al. vs. William Ranck, October Term, 1886, *No.* 668.

This case grows out of the same state of facts and involves the same questions, except there was no dismissal in this case, (nor was there any attempt to dismiss the first attempt to appeal in the case of L. D. Brown *et al. vs.* Wm. C. Hazard.) All other questions are the same in No. 668, (save the question of value,) and the arguments in all other respects are applicable to this case.

But in this case No. 668 there is filed a separate brief and argument by Judge Upton, raising an additional question, to wit: "That the decision on demurrer in the District Court below was not final, and argues that appellant should have gone to trial on

the undetermined issues." This looks like drifting into the case on its merits, and is not pertinent to a motion to dismiss; but it may be best to reply—

1st. The demurrers being overruled by the Court, left the *whole* case to be tried by a jury or by the same Court on the defences *demurred* to and overruled.

2d. We hold that the decision on the demurrers was *final* as to the *four* separate answers and defences *as plead*, and we were forced to go to trial on what we regarded as erroneous issues, or stand on our demurrers, which covered the whole *defence as plead.*

3d. We also hold we had the right, on the overruling of our demurrers to the whole or to *any portion* of the defence, to stand on our demurrers, and to appeal and have the decision of the Appellate Court below *on the merits* as to the ruling of the District Court on our demurrers, before we could be required to go to a jury trial below; and if the decision of said Appellate Court below was not satisfactory, appellants have the further right to come here for final review by this Court of the ruling and decision of said Appellate Court below in the way provided by law.

Appellee, by his counsel, claims that appellants did not demur to the 1st separate answer and defence, and left the 1st separate answer undenied and awaiting a reply. If this were true, it would not prevent our appeal on the demurrers overruled to settle the issues on *them* before trial.

But let us "*Gaze*" at the language of the alleged 1st separate answer, and see if the appellee's claim of "*ownership in fee*" is an independent allegation of title; or is not the *legal title claimed* altogether *dependent* on the sufficiency of the "*purchase and conveyance as hereinafter set forth?*" If so, it is not an *independent* allegation of *title in fee*, but is *dependent* on the sufficiency of the alleged *purchase* and *conveyance* as set forth in the 4th separate answer and defence, to which this language *must refer*, because in the 4th separate answer is the purchase and conveyance *fully set forth.* Now, should this 4th separate answer and defence prove insufficient on final hearing, what must become of the first, being but a part of and dependent upon the fourth defence? They, "*ex necessitate rei*," stand or fall together.

With these views of the plea in all these causes appellants did not specifically demur to the first, because it depended on the fourth *as plead.*

These three separate defences were demurred to as stated, overruled as stated, appealed to the Supreme Court, and dismissed out of Court for want of jurisdiction while exercising jurisdiction. Had the Supreme Court below heard this matter on the merits, as that Court should, and held the opinion they expressed in regard to the fourth separate answer and defence, there never would have been occasion for appellants to bring these causes here. But being dismissed by said Supreme Court, as per Rec., pp. 12, 13, there was no recourse or remedy but an appeal to this Court to set aside the dismissal that the causes may be heard on their merits.

Whereupon we ask these motions be dismissed with costs.

LEANDER HOLMES,
Attorney for Appellants.

In the Supreme Court of the United States, appealed for October term, 1886.

No. 668.

S. D. Brown *et al.*, *Appellants*,

vs.

William Ranck, *Appellee.*

On appeal to the Supreme Court of the United States.

Affidavit of value.

I, Leander Holmes, being sworn, depose and say, that I am one of the appellants in the above action; that I was acquainted with the value of the land in controversy on the 18th day of July, 1885, and have been since said date; that the value of said land at that date was over ($5,000) five thousand dollars, exclusive of all costs and disbursements in this action, and of all improvements placed thereon, and said land has continually increased in value since the date above stated. This affidavit is given because of a supposed defect of the affidavit in the transcript.

Signed, LEANDER HOLMES.

WASHINGTON CITY, D. C.

Subscribed and sworn to before me this the 30th day of December, 1887.

HENRY KOTTMANN,
Notary Public.

Supreme Court of the United States, October term, 1887.

Affidavit.

I, Leander Holmes, being sworn, depose and say I am the attorney of record and one of the appellants in all these cases—No. 989, 987, and 668. That in July, 1886, appellants did try to make their appeal to this Court in all three of said cases for the October term, 1886, and requested from the clerk a certified transcript of the record in each case. That the clerk at once left the Territory, and was absent during August and most of September, 1886, and did not furnish but the transcript in Case No. 668. That failing to get the other two transcripts for the October term, 1886, this affiant prepared transcripts in cases 987 and 989, and on the 17th day of November, 1886, took out a *new* appeal for the October term, 1887, as the record shows, and did at once send the same to the clerk with his fees, and sought his certificate to be appended at once, but said clerk did not certify to the same until the spring of 1887, and did not send them to me until the unknown (to me) attempt to dismiss the first attempted appeal *was sure*. That appellee, G. T. McConnell, had been, and then was, the deputy clerk of R. G. O'Brien, then clerk of the Supreme Court of the Territory, and that this affiant appended his affidavit of value in each case, and further this affiant says not.

Signed, LEANDER HOLMES,

Sworn to and subscribed before me this thirtieth day of December, 1887.

[Seal.] HENRY KOTTMANN,
Notary Public.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

L. D. BROWN *et al.*, *Appellants*,
vs.
McCONNELL, *Appellee.*
} No. 989.

L. D. BROWN *et al. vs* WM. C. HAZARD, No. 987.

L. D. BROWN *et al. vs.* WM. RANCK, No. 668.

Reply to Additional Brief of Appellees as to affidavits filed herein by Appellant, Holmes, Jan. 4, 1888.

This Appellant says,

That he left Oregon for the East on the 20th of Oct., 1887; that he received no notice of these motions until near the 1st Dec., 1887, and then by the receipt of appellees' motion to dismiss; that appellant applied for and secured affidavits of value executed in Portland, Oregon, 14th December, 1887, and did not receive them until the 27th day of Dec., 1887, being 14 days on the route after being mailed.

As to diligence.

But one of these appeals, No. 668, was taken for October term, 1886, and had an affidavit of values. The other two, No. 987—No. 989, were taken as new appeals in Nov., 1886, and docketed here in Aug., 1887.

On finding the affidavits had been abstracted, new ones were furnished, and, by order of this Court, filed on the 4th of January, as soon as it was possible, and five days before the appellees filed their motions.

The authorities quoted refer to *contests as to value.* There is no contest here. Appellees, in their answers, allege improvements in No. 989, at $5,000; No. 987, at $7,000; No. 668, at $3,500.

The land alone, in each case, is proven to be worth more than the law requires, and could be proven as worth more than double by each appellee.

My affidavit as to the McConnell appeal, No. 989, was, perhaps, not needed, but was inserted to sustain the allegations of my brief on the same matter, and that this Court might see the course pursued by the clerk below, and by McConnell, his deputy, the appellee in this cause.

We are incorrectly advised, if this appeal for the October term, 1887, already docketed by the clerk, needs a motion to have it docketed, because of the dismissal of an attempt to get the case here for the October term, 1886, and failed only by the fault and contumacy of the clerk of the Court below.

LEANDER HOLMES,
Att'y for Appellants.

IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, 1889.

In the Case of

L. D. BROWN et. al., vs. WILLIAM RANK.

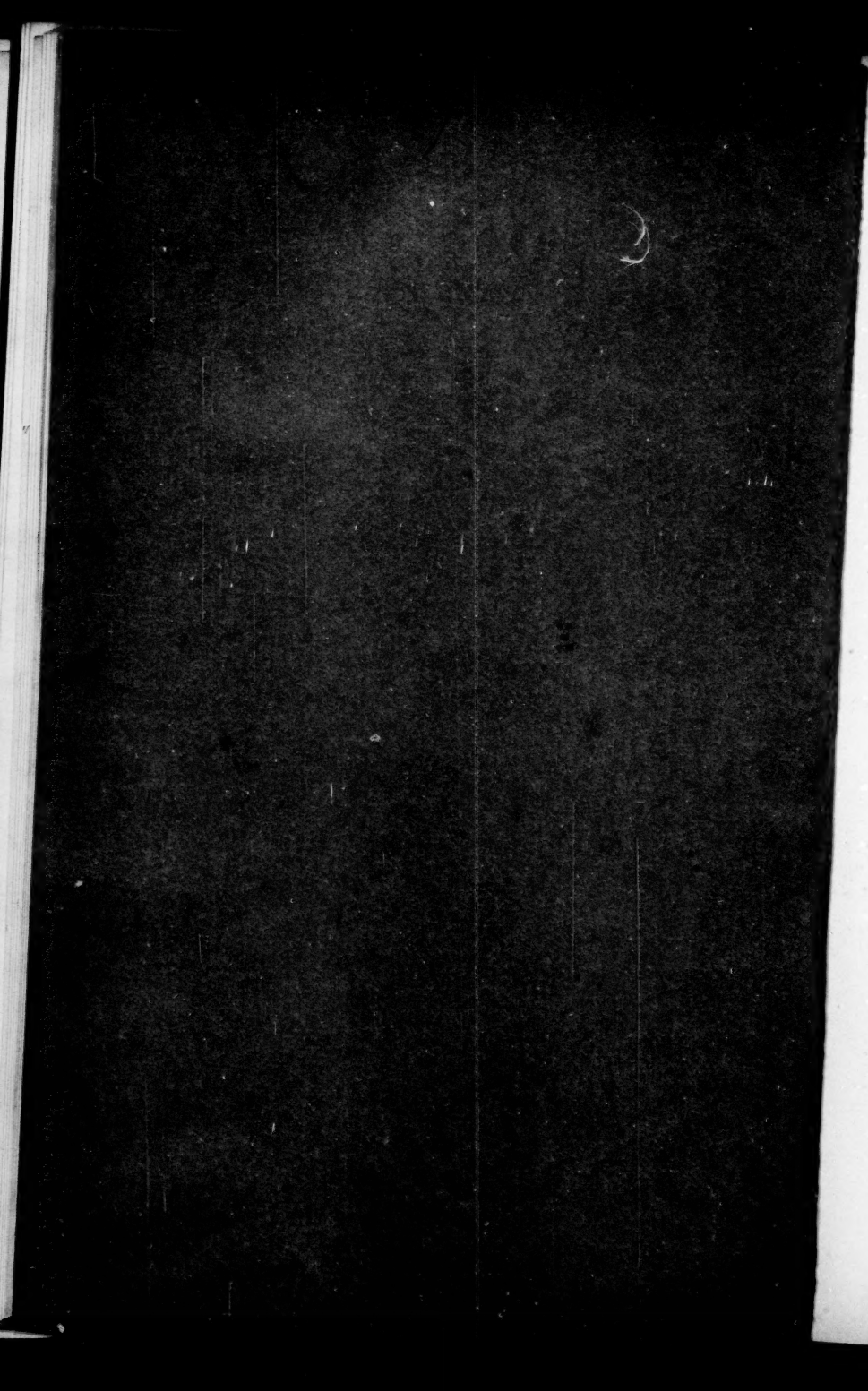
No. 99.

On Appeal from the Supreme Court of Washington Territory.

Statement of Facts, and Brief of Appellants.

LEANDER HOLMES,
Attorney for Appellants.

PORTLAND, OREGON:
ELLIS & SONS, PRINTERS 2, 4 AND 6 STARK STREET.
1889.



IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, 1889.

In the Case of

L. D. BROWN et. al., vs. WILLIAM RANK.

No. 99.

On Appeal from the Supreme Court of Washington Territory.

Statement of Facts, and Brief of Appellants.

This cause was brought for the possession of Real Estate, and damages for $1000.00 for the withholding of the same, began in the District Court of the 2nd judicial district of said Territory, 10th July, 1884.

An answer to the merits was filed by the defendant, including both legal and equitable defenses. See Record, pages 2 to 9.

Thereon a demurrer was filed by plaintiff, for the reason that said defenses, the second, third and fourth defenses, do not state facts sufficient to constitute a cause of defense. See Record, page 10.

Which demurrer being overruled by the Court, and plaintiffs standing on their demurrer, excepted to said ruling of the Court, and gave notice of appeal to the Supreme Court of the Territory, under the laws of the Territory of Washington at the time.

And also gave written notice of the appeal, and the grounds of the appeal, to the defendant to the Supreme Court of the Territory of Washington. See Record, pages 10 and 11.

That at the July term, 1885, of the Supreme Court, to which this cause was appealed, the appellee, by his attorney, filed a motion to dismiss said action, for reasons set forth in said motion. See Record, page 11.

Notwithstanding the argument and the law, the Supreme Court of the Territory did dismiss said appeal because, as the Court held:

"Getting the cause here for review was a proceeding in "the nature of a *writ of error*. Errors, therefore, should "have been assigned according to rule fifth. Let the case "be dismissed." Record page 12, and thereafter on motion "adjudged, and *decreed* that the *appeal*, from the judgment "of the District Court, be, and the same is hereby dismiss-"ed with costs," taxed at $40. See Record, page 13.

From which ruling and decision, this cause is brought here by appeal for review on its dismissal by the Court be-

low, * * * and, assuming this Court will not consider the merits of the case, except in so far as may be required to pass upon its dismissal by the Court below.

We will now proceed to assign some reasons, and the law showing that the appeal to the Supreme Court was correct, and that the Court was in error in its dlsmissal. We will first call attention to the act of Congress of 7th April, 1874, C. 80, Sec. 2, 18 Statute, page 27. Which affirms and validates the *mingling* of legal and equitable rights in the same action ; and provides, that in cases tried by jury, the case shall be reviewed by *writ of error*, and all others by *appeal.* This is applicable to all the Territories.

It will be seen that in the opinion of the Court below, and in its judgment of dismissal, the Court holds this case to be an action at law, and that *errors* should have been assigned.

We answer, that although this case was brought as an action at law, yet under the Code, Sec. 445, it was transformed to a cause in Chancery by the interpretation of the 4th separate answer, or equitable defense. Hence where the *law* authorizes the mingling of law and equity in one suit, the same rules are to be applied, as if the suit was begun in equity. *Sower* vs. *Weaver, 78 Penn. St., 443. Williams* vs. *Murphy, 21 Minn., 534.*

Now let us see what the *laws* of the Territory are, under which this appeal from the District Court to the Supreme Court was made, and which *laws* should have governed the Supreme Court in its opinions, and its judgment.

The Laws of the Territory in regard to Appeals.

Sec. 83 of the *code* of said Territory, authorizes the

pleading of legal or Equitable defenses, or both in the same suit. This was done by the defense.

Sec. 76 of the *Code* says: "that when a plea is addressed to the Judge of the District Court where the action is brought, the relief sought is of an *equitable* nature." This was done by the defense.

Sec. 445 of the Code says "that when *equitable* relief is sought or *chancery* jurisdiction has been exercised, the cause *shall* be *reviewed* on *appeal.*"

The Statute is peremptory: *shall be reviewed on appeal.*

But as a clincher to the correctness of the appeal from the District Court, to the Supreme Court of the Territory, let us refer this Court to the act of the Territory of November 23rd, 1883, which was the act in force when said appeal was made, 13th day of November, 1884. Record, p. 10.

ACT.

"Sec. 1. *Be it enacted by the legislative assembly of Washington Territory,* that any person desiring to remove a *cause* from any District Court of Washington Territory may do so, either in person or by his attorney of record, and in the following manner: Such person or attorney may give *notice in open Court,* or at chambers, that he appeals such cause to the Supreme Court of the Territory. Such notice shall, by order of the Court or judge have jurisdiction of the cause, be entered in the journal of such Court, *and no other service or notice of process shall be required,* and *thereupon* the clerk of such Court shall make and certify a full and complete transcript of said cause, including the journal entries thereunto appertaining, and cause such transcript to be

filed with the clerk of the Supreme Court within the time allowed by law; and thereupon the *Supreme Court* shall have *complete* and *perfect jurisdiction of such cause.*

"Sec. 2. That the Supreme Court shall hear and determine all causes removed thereto in the manner hereinbefore provided, *upon the merits thereof,* disregarding *all* technicalities.

"Sec. 6. All acts and parts of acts, so far as they conflict herewith, are hereby repealed."

Approved November 23d, 1883. Rec. p. 12.

We thus call attention of the Court to the above provisions of the *Code* and the Law; that the Court may readily see what the laws of the Territory were in regard to the *mode* and *method* by which causes shall be removed to the Supreme Court of the Territory.

The action of the District Court in overruling our demurrer to the fourth separate defense, (though proforma) yet sustained that defense, the Court necessarily acting in the capacity of chancellor, and exercising chancery jurisdiction, appellants were required by the *Code* and the *Law* of the Territory, to take this case to the Supreme Court of the Territory by *appeal* to secure its review.

Certainly it is not necessary, nor is it required, that the relief sought in equity should be a *good plea*—a sufficient plea—or prove an effectual plea, before a demurrer to it can be sustained—rather the contrary we think.

Yet the Supreme Court below, by its claimed power of "Gazing" admits the equitable character of the fourth plea; then in its *opinion* says: "Let the intent as to the

"last have been what it may. The matter pleaded did "not in our opinion display facts sufficient to constitute "a defense of any description."

This language most fully sustains our demurrer to the fourth separate answer, and should have been rendered on the *merits*, but unfortunately was uttered by the Court on a motion to dismiss our *appeal*. The object of the Court seemed to be to *eliminate* altogether the equitable defense, as a supposed necessity to grant the motion to dismiss our appeal.

Appellants believe that in the opinion and decision of the Supreme Court dismissing our appeal, serious errors exist, whereby appellants were, and are adversely effected. Therefore, these appellants claim that the Court below in opinion and decision erred as follows:

I.

In ruling "That the answer sets out four affirmative defenses," because the first alleged defense only pleads title "by purchase and conveyance as hereinafter set forth." Therefore, this first plea is no *independent* plea, but is dependent on the sufficiency of the purchase and conveyance thereafter set forth.

II.

THE COURT ERRED

In the total *elimination* from the answer of the fourth separate or equitable defense, as a supposed basis to sustain the motion to dismiss the appeal.

III.

THAT THE COURT ERRED

In holding that the District Court did not necessarily act as chancellor, in the face of the fact that said District Court did pass on the demurrer to said fourth separate defense.

IV.

THAT THE COURT ERRED

In holding that the decision of the Court below, was a decision at law, and that errors should have been assigned. See act of W. T., Nov. 23d, 1883, *supra.*

V.

THAT THE COURT ERRED

In dismissing the appeal for want of jurisdiction, or for any other reason.

Appellants further claim that said fourth separate answer is but a plea in the nature of a bill in equity, and for that reason this suit under the statutes of Washington Territory could only be reviewed on *appeal.* See Code, Sec. 83, 76 and Sec. 445.

In conclusion, the Court will permit us to add:

1st. The demurrers being overruled by the Court, left the *whole* case to be tried by a jury or by the same Court on the defenses *demurred* to and overruled.

2d. We hold that the decision on the demurrers was *final* as to the *four* separate answers and defenses as *plead,* and we were forced to go to trial on what we regarded as erroneous issues, or stand on our demurrers, which covered the whole *defense as plead.*

3d. We also hold we had the right, on the overruling of our demurrers to the whole or to *any portion* of the defense, to stand on our demurrers, and to appeal and have the decision of the Appellate Court below *on the merits* as to the ruling of the District Court on our demurrers, before we could be required to go to a jury trial below.

With these views of the plea in this case, appellants did not specifically demur to the first, because it depended on the fourth *as plead.*

These three separate defenses were demurred to as stated, overruled as stated, appealed to the Supreme Court, and dismissed out of Court for want of jurisdiction while exercising jurisdiction.

But being dismissed by said Supreme Court, as per Rec. pp. 12 and 13, there was no recourse or remedy but an appeal to this Court to set aside the dismissal that the cause may be heard on its merits below, therefore appellants ask that the case be remanded for trial on its merits, and that they be allowed all costs appertaining to this appeal.

LEANDER HOLMES,

Attorney for Appellants.

NOV 14 1890
JAMES H. MCKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 99.

L. D. BROWN AND LEANDER HOLMES, *Appellants*,

vs.

WILLIAM RANCK, *Appellee*.

APPEAL FROM THE SUPREME COURT OF WASHINGTON TERRITORY.

BRIEF OF APPELLEE.

W. W. UPTON,
Attorney for Appellee.
A. H. GARLAND,
of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 99.

L. D. BROWN AND LEANDER HOLMES, *Appellants*,

vs.

WILILAM RANCK, *Appellee.*

APPEAL FROM THE SUPREME COURT OF WASHINGTON TERRITORY.

BRIEF OF WILLIAM RANCK, APPELLEE, ON THE MOTION TO DISMISS, AND ON THE MERITS.

I.

MOTION TO DISMISS.

Comes now the said William Ranck, appellee, and moves the court to dismiss the appeal herein on the ground that the cause has not been brought within the jurisdiction of the court.

II.

STATEMENT OF THE CASE.

This was a possessory action in the nature of ejectment, commenced by the appellants in the District Court of the Second judicial dstrict of Washington Territory. The action was dismissed by that court without a decision of the merits of the cause, and the plaintiffs having appealed from the judgment of dismis-

sal to the Supreme Court of the Territory, the latter court dismissed the appeal, and the plaintiffs, by their present appeal, seek a reversal of the decision of the Territorial Supreme Court.

III.

At the last term of this court the appellee raised a question of jurisdiction, and asked a dismissal of the appeal, and upon consideration of the motion the case was permitted to remain on the calendar upon condition that appellants file an additional undertaking, and the condition was complied with on the part of the appellants.

The appellee desires to present the grounds of the motion to the jurisdiction, in connection with the argument on the merits.

IV.

GROUNDS OF THE MOTION TO DISMISS.

(1.) The judgment or decision of the district court was a mere nonsuit, leaving the appellants free to commence the action *de novo* without prejudice.

(2.) Neither the judgment of the District Court or that of the Territorial Supreme Court was a determination of the merits of the cause.

(3.) The subject-matter of the appeal is not such as can be brought within the jurisdiction of this court until further action shall be taken in the cause in the courts below.

V.

The transcript of the record is conclusive that no decision has ever been made in regard to the merits of the action or suit.

After the filing of the complaint, which alleges title in the appellants and is in the ordinary form of complaints in possessory actions in the nature of ejectment, the defendant filed his answer, which, besides setting up title in himself and other affirmative defences, contained the following denials:

"Defendant denies that plaintiffs or either of them are or ever were owners in fee, or otherwise, of the land described in their complaint or any part thereof."

"Denies that plaintiffs or either of them are or ever were entitled to the possession of said land or any part or parcel thereof."

"Denies that defendant wrongfully withholds possession of said land, or any part thereof, from plaintiffs, or either of them, or has at any time wrongfully withheld possession thereof from plaintiffs, or either of them, to their damage."

"Denies that plaintiffs have, or ever had, an interest in or right to the possession of the land described in their complaint, or any part or parcel thereof."

In addition to putting in issue each of the plaintiffs' allegations, by direct denial, the defendant pleaded affirmatively four separate defenses. In the first of these the defendant plead title in himself, and this defense is not met by replication or demurrer; to the last three of the separate defenses the appellants demurred, not to each defense severally, but to the three collectively, as follows:

"And now come the plaintiffs and demur to the second, third, and fourth separate answers and defenses of the defendant herein, for the reason that they do not state facts sufficient to constitute a defense to this action."

The demurrer being argued and submitted was overruled, and thereupon the appellants elected not to plead further to the answer, and gave notice of their intention to appeal, and by submitting the cause without proofs or further pleading, compelled the court either to non-suit the plaintiffs or to render a judgment on the merits in favor of the defendant; and the court non-suited the plaintiffs by entering the order of dismissal.

Both the ruling on the demurrer and the order dismissing the cause are set forth in one journal entry, but they are so set forth as to show the order in which they occurred and to show that they were two distinct rulings; that the ruling on the demurrer was not in the nature of a final decision in the cause; that the dismissal of the cause was a distinct and subsequent ruling, rendered necessary and unavoidable by the plaintiffs' refusal to reply or proceed further upon the issues of fact to which the demurrer did not relate, and that the cause was dismissed without any decision upon the merits of the case.

The journal entry is as follows:

"This case coming on for hearing upon demurrer to the answer, and having been submitted to the court on briefs of counsel of plaintiffs and defendant, and the court having fully considered the questions presented by the pleadings on file in this case, overrules the demurrer to the answer, to which ruling or decision the counsel for plaintiffs then excepted, and gave notice of their intention to appeal; and the counsel for plaintiffs having elected to stand upon the ruling of the court upon said demurrer and not to reply or further plead to the answer, the case is now here dismissed, with costs against the plaintiffs, to be taxed, and that execution issue therefor; whereupon counsel for plaintiffs excepted and gave notice of appeal to the Supreme Court."

The course taken by the plaintiffs indicates that they endeavored to take the appeal by virtue of section 447 of the Territorial Code of 1881, which is as follows:

"SECTION 447. The court may, also, in its discretion, prescribe rules for allowing appeals or writs of error on such other intermediate orders or decisions as is deemed expedient, and for permitting them to be taken and tried during the progress of the trial in the court below, but such intermediate appeals or writs must not retard proceedings in the court from which the appeal is taken."

That section being the only provision that allows the Territorial Supreme Court to entertain appeals or writs of error, except from final judgments and decrees.

VI.

The question is not solely whether Territorial Statutes have conferred on the Territorial Supreme Court supervisory jurisdiction to correct and modify intermediate and interlocutory orders before a decision is made on the merits. The real inquiry is, whether there is any provision, new or old, which requires this court to adjust such intermediate action of the courts below.

It is regarded as an established rule of this court that an appealable decision is one that determines the merits of the case.—Grant *vs.* Phenix Ins. Co., 106 U. S., 429.

The ruling on the demurrer did not determine the merits of the case but left the case pending under the general issue and upon one of the defences pleaded affirmatively by the defendant.

While the case was thus at issue by reason of the denials made by the answer, it was not within the discretion or power of the court to have lawfully adjudged the premises to the plaintiffs. The action of the plaintiffs in refusing to proceed in the District Court to a trial of the issues of fact, would, it is believed, have justified the District Court in declaring the plaintiffs in default, and entering final judgment on the merits in favor of the defendant, but that action was not taken and no judgment on the merits has ever been rendered in the case.

Were it within the jurisdiction for this court to review the proceedings, and could the appellants obtain the reversal they seek, the effect would be to obtain an order or judgment directing that the cause be tried in the Territorial District Court. A trial in that court is what the appellants can secure at any time at their option, by commencing the action *de novo*, the transcript clearly showing that no judgment has been rendered on the merits, it follows not only that a new suit can be commenced at any time, but the fact that the cause has not been tried on its merits, and that something must necessarily be done in that court to ascertain the rights of the parties, renders it impossible to obtain a review of the cause by application to this court.

"If the judgment is not one that disposes of the whole case on its merits, it is not final."

Bostwick *vs.* Brinkerhoff, 106 U. S., 3.
Smith *vs.* Adams, 130 U. S., 167, 177.
Beebe *vs.* Russell, 19 How., 283.

It is also a question that goes to the jurisdiction, that the cause was commenced as an action at law; and the attempt at review in this court is by appeal, and not by writ of error.

Appellants argue that the defendant, by pleading what is stated in the fourth separate defense, set up an equitable defense, and by that means transformed the action at law to a suit in equity.

This position the appellants cannot rationally take in support of the demurrer, in which they say it does not "state facts sufficient to constitute a defense to the action;" that is, a defense of any kind, either in law or equity. The appellants cannot rea-

sonably say by their demurrer that this part of the answer is no defense, and in their argument that by being a good defense in equity, it has changed the action at law into a suit in equity, and thus rendered an assignment of errors inapplicable and unnecessary.

It is conclusive that what is demurred to as the fourth separate defense cannot be treated as an equitable defense, that it is part of an answer in which the defendant alleges and sets forth a perfect legal defense, namely, the denials of the allegations of the complaint.

No code has ever attempted to set aside or abrogate the fundamental rule of equity practice and pleading, that in order to set forth an equitable defense, the pleading must show affirmatively that the party has no plain, speedy, and adequate defense at law; and inasmuch as the answer in this case denies the plaintiffs' alleged legal title, and thus shows a perfect defense at law, no equitable defense could be set forth in the same answer; the legal defense being thus set forth, nothing could be pleaded in the same answer that could convert the action at law to a suit in equity. The appellants have accordingly treated the case as an action, and even so denominate it in their demurrer.

It is therefore submitted that the case is not brought within the jurisdiction of the court, and also submitted whether the appeal was not taken for delay.

VII.

The Merits of the Case.

All the questions involved in the merits of the controversy between the parties to this action were before the court, and were decided in the case of Brazee *vs.* Schofield, 124 U. S., 495.

That case was also a possessory action in the nature of ejectment, and it was brought by the appellant, Brazee, to recover from the defendant, Schofield, a parcel or lot of land which, like the parcel sued for in this action, is one of the ten lots that constituted the west half, commonly known as the husband's half, of the donation claim of Amos M. Short and wife, and which were allotted severally to the heirs of said Amos M. Short by the proceedings in partition mentioned in the opinion; and in that case

this court considered and decided adversely to the appellants every point which they present in support of their right to recover in this action.

By reference to the opinion of the court in that case, it will be seen, as also appears by the transcript in this case, that Amos M. Short and Esther, his wife, settled upon the donation claim in question on the 8th of March, 1848, and resided upon and cultivated the land in compliance with the laws of the Provisional Government of Oregon and of the Territorial Government, and in compliance with the act of Congress of September 27, 1850, known as the Oregon Donation law; that the said Amos M. completed the four years residence and cultivation required by those laws, on the 8th of March, 1852, and that he died intestate on January 9th, 1853, not having in his life-time filed any notice with the Surveyor General. In that case it was shown by the record, as it is in the present case, that the only notice describing the claim which was presented to the Attorney General, was filed by the widow and administratrix, Esther Short, on October 4th, 1853, and it was claimed in that case, as it is claimed by the appellants in this, that a widow or administratrix could not file an effective notice.

It was also claimed that the segregation of the wife's half of the donation claim was irregularly made; that the partition made in 1855 was not effective, and, in fact, the said Brazee urged every objection to the title of the defendant Schofield that is urged in this case against the title of the appellee, and upon consideration the court overruled the objections and sustained the defendant's title.

It is submitted that the case of Brazee *vs.* Schofield is conclusive of all points involved in this case, and that if the Territorial District Court had rendered a judgment on the merits in favor of the defendant, such judgment would have been in accordance with the decision in that case.

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